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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN MENDELL,

Plaintiff and Appellant,

v.

JONATHAN TURNER et al.,

Defendants and Respondents.

D060540

(Super. Ct. No. 37-2010-00105705-
CU-MC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Dato, Judge. Affirmed.

Plaintiff John Mendell appeals from a judgment in favor of his two children, defendants and respondents Jonathan Turner and Nicole Turner (together the Turners), entered after the court sustained the Turners' demurrer to Mendell's first amended complaint without leave to amend. Mendell does not challenge the court's order sustaining the demurrer to his first amended complaint. He contends only that the court

erred in denying him an additional opportunity to amend. We reject his contention and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 28, 2005, Mendell's father executed the John J. Mendell Trust (the Trust). The Trust provided that upon the death of Mendell's father, its assets would be held for the benefit of Mendell's half brother, Craig Mendell. According to the Trust, upon Craig's death the remaining assets would be distributed in equal shares to the Turners. Further, it expressly excluded Mendell as a beneficiary stating that "[he] does not desire or need any money . . . from [the Trust]." The Trust also contained a "no contest" clause which provided that "[i]f any person named in this Trust or any legal heir . . . contests this Trust . . . they . . . shall take nothing under [the] Trust" After Craig's death on April 19, 2008, the Turners became the sole beneficiaries of the Trust and its assets were distributed equally between them.

Approximately two and a half years later, Mendell filed a civil complaint against the Turners claiming a right to a portion of the Trust. He alleged two causes of action: imposition of constructive trust, and resulting trust. Mendell argued that after the death of his father, the Turners orally promised they would share the proceeds of the Trust equally with him. Mendell further alleged the Turners reiterated their promise after Craig's death. In reliance upon this promise, Mendell claimed he made no effort to contest the Trust. The Turners immediately demurred to the complaint.

Instead of contesting the demurrer, Mendell filed a first amended complaint (FAC). His new complaint pleaded the same causes of action, but added new allegations

pertaining to the Turners' partial performance on their promise. The Turners again demurred, arguing that Mendell's FAC failed to state a viable claim because he could not establish detrimental reliance. The Turners argued that if Mendell had actually contested the Trust, he would have triggered the "no contest clause," and recovered nothing. Further, the Turners alleged that Mendell's second cause of action was barred by the 120-day statute of limitations imposed in Probate Code section 16061.8.¹

Mendell opposed the demurrer, asserting that while his "pleading [was] somewhat inept, it still state[d] sufficient facts to state a claim for breach of the agreement. . . ." Mendell further argued that the statute of limitations had not run on his second cause of action because the Turners partially performed on the oral contract. However, Mendell did not specifically oppose the Turners' argument that his complaint failed to establish detrimental reliance. Further, he did not ask for leave to amend his complaint, or provide any type of amendment he could make in the event the court found the allegations of his FAC to be insufficient.

At the demurrer hearing on July 8, 2011, Mendell did not appear or provide any oral argument. The court sustained the Turners' demurrer without leave to amend on the grounds that Mendell did not establish detrimental reliance in his FAC. Further, Mendell did not offer any means of amending his pleading to address the issue. The court then entered judgment in favor of the Turners. This appeal followed.

¹ Probate Code section 16061.8 states: "No person upon whom the notification by the trustee is served . . . may bring an action to contest the trust more than 120 days from the date notification by the trustee is served upon him or her"

DISCUSSION

Mendell concedes the court's order sustaining the demurrer to his FAC was correct. His only claim pertains to leave to amend. We review a trial court's order refusing to permit a plaintiff to amend a complaint for an abuse of discretion. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) Because of our state's liberal pleading rules, a trial court's exercise of discretion in this regard is limited. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971 (*Aubry*).) It is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows a reasonable possibility a defect in the complaint may be cured by amendment. (*Ibid.*; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1387 (*Careau*).)

The plaintiff has the burden to show in what manner the pleadings may be amended and how such amendments will change their legal effect. (*Careau, supra*, 222 Cal.App.3d at p. 1388.) This showing may be made for the first time on appeal, even where plaintiff made no request for leave to amend in the trial court. (Code Civ. Proc., § 472c, subd. (a);² *Aubry, supra*, 2 Cal.4th at p. 971.)

Mendell did not offer any means of amending his pleading to the trial court, or on appeal. Both the record and Mendell's opening brief are silent as to what amendment he can make to his pleading to cure the defects identified by the court. Without providing any means in which he can amend his complaint, we are left to speculate as to what he

² Code of Civil Procedure section 472c, subdivision (a) states: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made."

could change. Mendell bears the burden of demonstrating that there is a reasonable possibility that the defects in his pleading can be cured by amendment, and he has not met this burden. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) Under these circumstances, we cannot conclude that the court abused its discretion in not granting leave to amend. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349-350.)

DISPOSITION

The judgment is affirmed. The Turners are awarded costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.